

## MINUTES

### STANDING COMMITTEE ON THE MODEL UTAH CRIMINAL JURY INSTRUCTIONS

Administrative Office of the Courts  
450 South State Street  
Salt Lake City, Utah 84114

Wednesday, April 5, 2017  
12:00 p.m. to 1:30 p.m.  
Judicial Council Room

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#### PRESENT

Judge James Blanch, Chair  
Keisa Williams, Staff  
Mark Field  
Sandi Johnson  
Linda Jones  
Karen Klucznik  
Judge Brendon McCullagh  
Steve Nelson  
Nathan Phelps  
Jeni Wood, Recording Secretary

#### EXCUSED

Jesse Nix  
David Perry  
Judge Michael Westfall  
Scott Young

#### 1. Welcome

**Judge Blanch**

Judge James Blanch welcomed everyone to the meeting. Judge Blanch noted there were enough members to meet the requirements of a quorum.

*Nathan Phelps recommended one minor change to the minutes. Sandi Johnson moved to approve the minutes from the February 1, 2017 meeting with the change noted by Mr. Phelps. Nathan Phelps seconded the motion and it passed unanimously.*

#### 2. Public Comments on Drug Offense Instructions

**Judge Blanch**

Judge Blanch discussed the public comments received on the Drug Offense Instructions. Ms. Johnson distributed a copy of Utah Code § 58-37-2. She discussed instruction 1202 and the comments she received from her colleagues. Ms. Johnson recommended a separate definition of Possession to mirror the statutory definition. Ms. Klucznik and Judge Blanch agreed that the statutory definition of Possession should be added. Ms. Johnson recommended two separate definitions – one for Possession and one for Constructive Possession. Judge Blanch suggested separating 1202 into two instructions, 1202(a) and 1202(b). The committee then worked on separating the current instruction. Ms. Jones questioned the difference between “use” and “possess” and suggested that “use” be deleted. Mr. Field said the statute seems to equate the

words “possession” and “use,” but he thinks it would be easier for prosecutors to use the word “use.” Judge Blanch said if the two words have the same definition, one should be deleted. Ms. Jones said she believes the words have the same definition. Ms. Johnson noted that according to *State v. Ireland*, if someone “uses” drugs in another state where drugs are legal and then tests positive in Utah they cannot be convicted. Ms. Johnson said in *Ireland*, a trucker drove in to Utah and after an accident, he tested positive for marijuana. Judge Blanch said he's never seen a case where someone was charged for testing positive with no other evidence against them. Ms. Johnson stated that in Salt Lake County they don't, but she is aware of other counties where they are charged. Ms. Jones asked if any of the instructions discuss metabolite. The committee members did not believe there were instructions directly relating to metabolite. Mr. Phelps said “consumption” means ingesting or having any measurable amount in a person's body, but does not include metabolite. Mr. Phelps was concerned that adding “metabolite” to the instruction would cause experts to start being brought into court to testify. Mr. Nelson said they have to look at what is factually available. Ms. Jones said the word “use” would apply under situations like “use of a firearm” and wondered if it would apply here in the same way.

Judge Blanch suggested simply taking out the words “use” or “user” and keeping “possess.” Judge Blanch suggested changing the elements instruction as well. Mr. Field wondered if there needed to be an instruction or committee note stating that “possession” and “use” are the same things. Ms. Johnson noted that defense attorneys might argue that without “use” in the instruction, their client can't be convicted. Ms. Klucznik wondered if this instruction would apply to paraphernalia. Mr. Phelps stated this definition does not apply to drug paraphernalia. The committee made various changes to the instructions.

Ms. Johnson noted the word “occupancy” relates to the Constructive Possession instruction. The committee discussed the term “occupancy” and chose to delete it. The committee discussed whether to keep the word “belonging.” Judge Brendan McCullagh said he would like to see the word “possession” deleted because as the statute is currently written, a person doesn't actually have to “possess” something to be guilty. The committee discussed the word “controlled.” Ms. Jones recommended removing the word “controlled” from a portion of the instruction to simplify the phrase and because the word “controlled” may get confused with the phrase “controlled substance.”

Judge Blanch recommended a committee note explaining the elimination of terms. The committee drafted a committee note. Mr. Nelson noted prosecutors are leery of instructions that don't follow the statute. Judge Blanch noted that before allows the use of an instruction, he makes sure it is amended to be case-specific and that attorneys on both sides typically like more detailed instructions. After further discussion, the committee finalized the revised instructions as follows:

#### **CR 1202(a). General Definition of Possession of a Controlled Substance.**

"Possession" of a controlled substance means:

- owning,
- controlling,
- holding,

- retaining,
  - maintaining,
  - applying,
  - inhaling,
  - swallowing,
  - injecting, or
  - consuming
- a controlled substance.

[For a person to possess a controlled substance, it is not required that the person individually possess it. It is sufficient if the person participated with one or more persons in the possession of a controlled substance with knowledge that the activity was occurring, or the controlled substance is found in a place or under circumstances indicating constructive possession.]

### **References**

Utah Code § 58-37-2

*State v. Lucero*, 350 P.3d 237 (2015)

### **Committee Notes**

Separate reference to the statutory term “use” was omitted from this instruction and the corresponding elements instruction because “possession” and “use” are defined identically in Utah Code section 58-37-2(1)(ii).

In addition, “belonging” and “occupying” were omitted from this instruction because the concepts are covered under the definition of constructive possession in CR 1202(b).

This instruction contains bracketed language which suggests optional language. Please review and edit before finalizing this instruction.

### **CR 1202(b). Definition of Constructive Possession.**

A person is in constructive possession [a controlled substance] [drug paraphernalia] when the person has the ability and the intent to exercise control over it. Factors relevant to deciding constructive possession may include the following:

- ownership and/or occupancy of the [residence] [vehicle] [property] [personal effects] where the [controlled substance] [drug paraphernalia] was found;
- whether that ownership or occupancy was exclusive;
- presence of the [controlled substance] [drug paraphernalia] in a location where (DEFENDANT’S NAME) had special control;
- whether other people also had access to the location of the drugs;
- presence of (DEFENDANT’S NAME) at the time the [controlled substance] [drug paraphernalia] was found;
- (DEFENDANT’S NAME) proximity to the [controlled substance] [drug paraphernalia];

- previous drug use;
- incriminating statements or behavior; or
- any other factor related to whether (DEFENDANT’S NAME) had the ability and intent to exercise control over the [controlled substance] [drug paraphernalia].

### **References**

Utah Code § 58-37-2

*State v. Lucero*, 350 P.3d 237 (2015)

### **Committee Notes**

This instruction contains bracketed language which suggests optional language. Please review and edit before finalizing this instruction.

### **CR 1203. Possession of a Controlled Substance.**

(DEFENDANT’S NAME) is charged [in Count \_\_\_\_] with committing Possession of a Controlled Substance [on or about (DATE)]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT’S NAME);
2. Intentionally and knowingly;
3. Possessed (NAME OF CONTROLLED SUBSTANCE/COUNTERFEIT SUBSTANCE), a schedule [I] [II] [III] [IV] [V] [controlled substance] [counterfeit substance][; and]
4. The defense of \_\_\_\_\_ does not apply].

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

### **References**

Utah Code § 58-37-4.2

Utah Code § 58-37-8(2)(a)(i) & (2)(d)

*State v. Miller*, 2008 UT 61, 193 P.3d 92

*State v. Ireland*, 2006 UT 17, 133 P.3d 396

### **Committee Notes**

This instruction contains bracketed language which suggests optional language. Please review and edit before finalizing this instruction.

The defenses referenced in paragraph 4 of the instruction are affirmative defenses as defined by Utah statute or case law.

*Judge McCullagh moved to approve the proposed division of instruction 1202 to 1202(a) and 1202(b), revisions to instruction 1203 and the committee notes, then to re-publish them. Ms. Jones seconded the motion and it passed unanimously. Ms. Williams will publish these to the website.*

### **3. Justification Defense Instructions**

**Mark Field**

The committee briefly discussed the instruction on Use of Force in Defense of Habitation and noted potential changes. Ms. Williams will amend those instructions as indicated for the next meeting.

### **4. Other Business**

**Committee**

Ms. Williams noted that HB 139 passed the legislature, eliminating the defense of involuntary intoxication in a prosecution for rape. The committee discussed the instructions relating to involuntary intoxication. Judge McCullagh said it's not a defense; it's something that mitigates defense. Ms. Jones doesn't believe any changes are required to relevant instructions. Ms. Williams reviewed several additional bills that the committee may need to address; including HB 379, HB 202, HB 99, HB 17 and HB 369. HB 369 enacts provisions to enhance the classification of a sexual offense if the actor was infected with HIV or other viruses. The committee briefly discussed HB 369 and determined that a Special Verdict Form may be necessary.

Ms. Jones stated she is ready to present her instruction related to fur-bearing animals.

### **5. Adjourn**

**Committee**

*The meeting was adjourned at 1:25 p.m. The next meeting is Wednesday, May 3, 2017.*